IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.192 OF 1990.

1. Nagesh Vasant Deshpande

2. Vasant Bhimrao Deshpande
(through legal heir
Nagesh Vasant Deshpande) .. Appellants.

V/s.

1. Channappa Dattu Kumbhar

2. Mahadeo Datu Kumbhar
(through legal heirs
Champaid Dattu Kumbhar)

3. Parshuram Dattu Kumbhar

4. Bhivari Dattu Kumbhar

5. Narayan Jyoti Kumbhar

6. Bharmu Jyoti Kumbhar .. Respondents.

Respondent no.4 deleted as per order dt.8.3.1991.

Mr.G.R.Rege for the Appellant .

Mr.S.G.Ghogare for the Respondents.

CORAM : S.R. SATHE, J.

DATED : 6th August, 2004.

JUDGMENT. :

1. Being aggrieved by the judgment and order passed by the Court of the Additional District Judge, Kolhapur in regular Civil Suit No.295 of 1985, whereby the order passed by the court of C.J.J.D. Chandgad in Regular Civil Suit No. 46 of 1974 permanently restraining the defendants from obstructing plaintiff's possession of the suit land was confirmed and the appeal was dismissed, the original defendant has preferred this second appeal. For the sake of convenience hereafter the parties shall be referred to

as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under :

. The suit property bearing survey no.114/1 situated at Mouje Shirgaon, Tal. Chandgad, District Kolhapur is owned by the defendant. The said property was mortgaged to one Shivling Gurappa Humbarwadi and he was in possession of the same since 1945. The said Shivling then inducted the present plaintiff in the said land as a tenant. It is alleged that on 8.12.1974 the original defendant tried to enter the suit land, hence the plaintiff filed suit for simplicitor injunction.

. The defendant filed his written statement and contended that though the land was mortgaged to Shivlingappa the possession had infact continued with the defendants and the plaintiff has falsely averred in the plaint that the suit land has been given to him as tenant by Shivlinga. The defendant also raised several other contentions and lastly submitted that plaintiff was not in actual possession of the said land and as such not entitled to get relief of injunction. On these pleadings the trial court framed issues at exhibit 54. Both the parties adduced oral as well as documentary evidence. From the material on record

the trial court came to the conclusion that plaintiffs have proved their possession over the suit land from the date of the suit and that the defendants obstructed the plaintiff's possession. Suit for injunction was therefore decreed in plaintiff's favour.

. Being aggrieved by the said judgment and order, the defendants filed Civil Appeal No.295 of 1985. The appellate court also came to the conclusion that the decree passed by the trial court is legal and correct and that it is not necessary to interfere with the judgment and decree. He therefore dismissed the appeal.Being aggrieved by the same the defendants preferred the second appeal.

3. In this appeal before me, Shri Rege, learned Advocate for the Appellant/defendants has urged two points. Firstly, he submitted that the Civil Court had infact no jurisdiction to decide the issue as to whether the Plaintiffs were in possession as tenant and the Court ought to have referred the said issue to the tenancy authorities as per the provisions of Section 85 of the Bombay Tenany and Agricultural Lands Act. Secondly, he also argued before me that the first appellate court should have framed proper points for consideration instead of merely saying that the question arose as to whether the judgment passed

by the learned trial court is correct or not. As against this the learned advocate for the plaintiff supported the judgment and order passed by the appellate court.

4. While admitting the appeal on 14.8.1990, this Court observed "The point is whether the defendant's possession is shown to be referable to a title 12 as tenant and which possession required protection". From the perusal of the averments in the plaint it is crystal clear that it was suit simplicitor for permanent injunction. It is true that in the plaint specific averment was made that the plaintiffs are not in possession as tenant of Shivlingappa. It is also correct that in the Written Statement the defendants had contended that the Plaintiffs are not the tenants. It is needless to say that the pleadings of the parties give rise to issues. However, in the instant case finding that the suit was simplicitor for permanent injunction and the plaintiffs had averred that on the date of the suit they were in actual possession of the land, the only issue framed by the trial court was " Do the plaintiffs prove their possession over the suit land on the date of the suit?" . There is nothing on record to show that at the relevant time the defendants had contended that issue with regard to tenancy be framed. The learned trial court also felt that the main issue for determining the

real controversy between the parties was the possession of the land on the date of the suit and as such the trial court rightly framed the above mentioned issue.

5. It is pertinent to note that the plaintiffs had adduced specific evidence with regard to previous proceedings and had also placed on record deposition of the defendant wherein the defendants had clearly admitted that the plaintiffs were in possession of the suit land as tenants. Naturally, there was no necessity to frame issue with regard to tenancy . Though there was the opportunity for the defendant to explain this admission he had not done so. Thus, the said admission wherein the defendant’s have clearly admitted the possession of the Plaintiffs estopps the defendant now from contending that the plaintiffs are not in possession. Besides the above mentioned admission of the defendants, the plaintiffs had produced sufficient documentary evidence to indicate that the plaintiffs are in actual possession of the suit land for last several years. Having regard to the above position and the evidence, the trial court as well as the first appellate court have recorded a positive finding that the plaintiffs are in possession of the suit land. Once it is held that having regard to the material o n record, and in particular admission of the defendant, the court has decided the

matter, it cannot be said that there was necessity for the trial court to frame the issue with regard to tenancy and then to refer it to the tenancy authorities.

6. The learned advocate for the appellant/defendant has drawn my attention to a case Bhagwanrao Auti vs. Ganpatrao Raut reported in 1987(3) Bom.C.R.258 wherein the Division Bench of this High Court has observed that in a suit simplicitor for permanent injunction, it would be necessary to frame an issue of tenancy either in favour of plaintiff or defendant before granting relief of permanent injunction. However, the facts of the said case and the facts of the case in hand are different. In the above mentioned case for deciding as to whether plaintiff was entitled for injunction there was necessisty to determine the issue with regard to tenancy. In the instant case. the defendants have infact clearly admitted in the previous litigation that the plaintiffs are in possession of the land in question as tenants. So, when there was no necessity at all to frame that issue, question of referring the same to the tenancy authorities did not arise. Hence I think that the ratio of the above cited ruling is of no use to the present appellant/defendant. Shri Rege strenuously argued before me that in the instant case the lower court has given the finding that the defendant is the tenant.

According to him the said court had no jurisdiction to give such finding and if the said finding is not set aside it would be binding on defendants. Firstly, it must be noted that there was no specific issue with regard to tenancy and while appreciating the evidence the lower Court has made observation that the defendants have admitted in the earlier proceedings that the plaintiffs are in possession of the suit land as tenants. So, this observation cannot be regarded as a finding of the court on the point of tenancy contemplated under the act.

7. From the perusal of the judgement of the first appellate court it is very clear that the said court has properly considered the entire evidence on record and has correctly observed that the plaintiff has proved the possession of the suit land on the date of the suit and therefore rightly dismissed the appeal. In this view of the matter there is no substance in the appeal. The appeal is dismissed with costs.

(S.R.Sathe, J.)

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